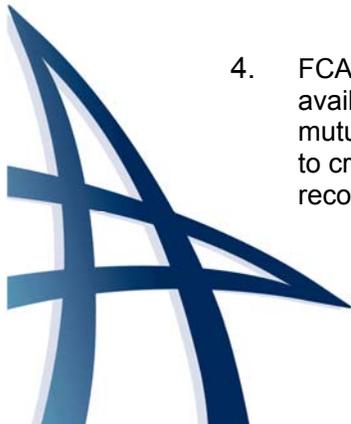


Briefing Note: Fourth Session of the Intergovernmental Negotiating
Body on an Illicit Trade Protocol
Geneva 14th March to 21st March 2010

OFFENCES, PENALTIES AND ENFORCEMENT

1. FCA strongly believes that Parties should commit to establishing offences to deter and punish illicit trade, to treating serious forms of illicit trade as serious crime, and to cooperating effectively in investigation of and enforcement against illicit trade. FCA seeks a protocol that will be of practical benefit in encouraging, supporting and assisting Parties in effective investigation and enforcement to combat illicit trade.
2. In view of the role and remit of the World Health Organization, and the functions and resources of the FCTC Secretariat, the capacity to deal with criminal justice issues in this forum is necessarily limited.
3. Significant institutional experience and expertise in facilitating implementation of states' international criminal justice commitments already exists in other international organizations, particularly the UN Office on Drugs and Crime (UNODC), which oversees implementation of the UN Convention against Transnational Organized Crime (UNTOC) and other multilateral criminal treaties. Some of the treaties overseen by UNODC overlap at least in part with the current Negotiating Text for the Protocol, particularly UNTOC, to which the overwhelming majority of Parties to the FCTC are Parties. UNTOC provisions, for example, on laundering of the proceeds of crime, confiscation and seizure, international cooperation for purposes of confiscation, extradition, mutual legal assistance, joint investigations, special investigative techniques and transfer of proceedings, apply to illicit trade in tobacco if:
 - It involves serious crime (offences punishable by a maximum penalty of imprisonment of at least four years or a more serious penalty);
 - It is transnational in nature (committed in more than one state, or committed in one state but: with a substantial part of its preparation, planning, direction or control taking place in another state; or involving an organized criminal group that engages in criminal activities in more than one state; or having substantial effects in another state); and
 - It involves an organized criminal group (a 'structured' group of three or more persons, existing for a certain period and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with UNTOC in order to obtain, directly or indirectly, a financial or other material benefit).
4. FCA has previously suggested that in order to avoid duplication and apply available resources as effectively as possible, it would be best to apply existing mutual legal assistance and extradition agreements more effectively, rather than to create a new regime under the protocol. However, in view of the recommendations of the intersessional Drafting Group for draft provisions on



mutual legal assistance and extradition for consideration at INB 4, we would recommend that that these complement and do not detract from existing obligations.

Information Sharing

5. FCA supports the inclusion in the protocol of provisions to ensure effective information sharing, to facilitate the prevention, detection, investigation, prosecution and combating of illicit trade. The Negotiating text contains a number of useful proposals for information sharing. However, the draft provisions will need to be streamlined and clarified in order to ensure that they work effectively. As currently drafted, the provisions propose a number of different processes for information sharing, with, in some cases, the same or similar kinds of information dealt with through different processes or through more than one process. There are six draft Articles in Part V of the negotiating text that contain provisions dealing with information sharing:
 - Article 20 (Information sharing: statistical data);
 - Article 21 (Information sharing: operational data);
 - Article 22 (Information sharing: confidentiality and protection of information);
 - Article 24 (Assistance and cooperation: investigation and prosecution of offences);
 - Article 28 (Law enforcement cooperation); and
 - Article 29 (Mutual administrative assistance)
6. These provisions are in addition to exchange of information covered by draft Article 6 (Customer identification and verification), draft Article 7 (Tracking and tracing) and draft Article 8 (Record-keeping).
7. In addition to information exchange through the proposed tracking and tracing 'global information sharing focal point', information is proposed to be shared by two principal means: communication to a 'secure, central, automated database' (Art 20); and exchange directly between Parties, either on their own initiative or on request (Arts 8, 21, 24, 28, and 29). For each of the Articles proposing direct exchange between Parties, either processes for exchange are not specified, or different processes are proposed, with different requirements, qualifications and protections:
 - under Article 8.6, no specific procedure is proposed, rather: *'Each Party shall, as appropriate and subject to national laws, establish a system for sharing details contained in all records kept in accordance with this Article with other Parties'*;
 - under Article 21, it is proposed that Parties shall exchange certain information *'on their own initiative or on the request of a Party that provides due justification that such information is necessary for the purposes of detection or investigation of illicit trade in tobacco, tobacco products [or manufacturing equipment used in the manufacture of tobacco products] ... [subject to national law]'*;
 - under Article 28.1(g) and (h), it is proposed that: *'Each Party shall adopt, consistent with their respective domestic legal and administrative systems, effective measures to exchange relevant information'*; and

- under Article 29, it is proposed that: *'Parties shall provide each other, either on request or on their own initiative', with certain information.*
8. The information proposed to be shared under Part V is listed below. It has been ordered so as to group similar types of information, which are dealt with in different Articles, together:
- *'details of seizures of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products, including case reference information where appropriate, quantity, value of seizure, product description, entities involved, date and place of manufacture; modi operandi including means of transport, concealment, routing and detection; counterfeit and genuine brands; and taxes evaded' (Art 20.1(a));*
 - *'trends, concealment methods and modi operandi used in illicit trade in tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products' (Art 20.1(d));*
 - *'relevant information on... specific means and methods used by natural or legal persons in committing criminal offences covered by the protocol, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities' (Art 28.1(f));*
 - *'new trends, means or methods of committing offences, listed in Article 12' (Art 29(b));*
 - *'information for identification, monitoring and prosecution of legal or natural persons involved in illicit trade in tobacco, tobacco products or equipment used in the manufacture of tobacco products' (Art 21(b));*
 - *'relevant information... for the purpose of early identification of the offences covered by this Protocol' (Art 28.1(g));*
 - *'persons known to have committed or to be a party to an offence listed in Article 12 [or suspected of being about to commit such an offence]' (Art 29(d));*
 - *'goods known to be the subject of offences, listed in Article 12, as well as details of description, packaging, transport and storage and methods used in respect of those goods' (Art 29(c));*
 - *'records of licensing for the legal and natural persons concerned' (Art 21(a));*
 - *'records of investigations and prosecutions' (Art 21(c));*
 - *'records of payment for import, export or duty-free sales of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products' (Art 21(d));*
 - *'import, export, transit, tax-paid and duty-free sales and quantity or value of production of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products' (Art 20.1(b));*
 - *'data on the agricultural production of tobacco' (Art 20.1(c));*
 - *'new customs and other enforcement techniques of demonstrated effectiveness' (Art 29(a));*
 - *'any other relevant information, as agreed by the Parties' (Art 20.1(e));*
 - *'any other data that would assist designated agencies in risk assessment for supply chain control and other enforcement purposes' (Art 29(e)).*

9. This information is in addition to that proposed to be shared under Part III, including under draft Article 6 (which proposes information sharing with respect to persons ‘blocked’ from engaging in relevant commercial transactions), draft Article 7 (which proposes sharing of ‘tracking and tracing’ information through a ‘global information sharing focal point’), and draft Article 8 (under which ‘all records kept in accordance with this Article’ are proposed to be shared between Parties).
10. There are:
- two draft provisions dealing with the designation of a central authority for information sharing – Article 22.1, which proposes that each Party ‘shall designate the domestic authority to which operational and statistical data are supplied’; and Article 24.2 bis, which proposes that each Party ‘shall [consider]/[ensure] the establishment or the designation of authorities to serve as a national centre for the collection, analysis, and dissemination of information among the other authorities and with other Parties’;
 - two draft provisions dealing with communication between relevant agencies and authorities – Article 24.2, which provides that Parties shall ensure that relevant ‘*administrative, regulatory, law enforcement and other authorities ... can cooperate and exchange relevant information at national and international levels*’; and Article 28.1(a), which provides that Parties shall adopt effective measures to ‘*enhance and, where necessary, establish channels of communication between the competent authorities and agencies in order to facilitate the secure and rapid exchange of information*’;
 - three draft provisions providing for confidentiality and protection of information exchanged under the protocol (Arts 20.5, 22.2, and 29). One of these, Article 22.2, is expressed to apply to all forms of information exchange under the protocol, in relation to *which* ‘*Parties shall protect, as mutually agreed, any confidential information that is exchanged*’; and
 - five draft provisions that propose that obligations be consistent with Parties’ domestic laws or arrangements – Article 20.3 (*‘subject to that Party’s legal and administrative provisions’*); Article 21 (*‘subject to national law’*); Article 22.2 (which proposes that all forms of information exchange under the *protocol* ‘*shall be subject to national law regarding confidentiality and privacy*’); and Articles 28.1(f) and (g) (*‘consistent with their respective domestic legal and administrative systems’*).
11. FCA recommends the inclusion of a single, clear provision on information sharing in the protocol, combining the proposals in the various draft provisions described above. FCA also notes that clarification is required with respect to *the* ‘*secure, central, automated database*’ proposed in Article 20. At INB-3, it was suggested that either the Convention Secretariat or the World Customs Organization (WCO) might perform this function. Before provisions dealing with a central database can be concluded, clarification will be required as to who will manage the proposed database (and, if the database is not to be managed by the Convention Secretariat, what arrangements will be made and provisions included to allow for this), how and by whom information will be placed on the proposed database, and how and to whom information on the proposed database will be accessible. Once the operation of the proposed database has been clarified, it will be possible to clearly identify which information should be shared through the database and which only between Parties directly, either on their own initiative or on request.